No. 14,574

IN THE

United States Court of Appeals

For the Ninth Circuit

STEPHEN F. HERINGER, MABEL H. HERINGER, JOHN F. HERINGER, and ALTA G. HERINGER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decision of the Tax Court of the United States.

PETITION FOR REHEARING.

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Table of Authorities Cited

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To the Honorable William E. Orr and Richard H. Chambers, Circuit Judges, and William C. Mathes, District Judge.

Petitioners respectfully request you grant a rehearing on your decision of June 7, 1956.

Our request is founded entirely upon the sincere belief that it is your desire to have afforded each party a full and fair hearing on all of the issues adjudicated, and to make as complete a disposition of those issues in these particular cases as is possible at the present time.

Specifically, we believe the oral argument of March 14, 1956 was, in no manner addressed by either counsel for the respondent or counsel for the petitioners to the issue or question of whether there were gifts of "future interests" as applied to the facts of the instant cases, under Section 1003 (b), 1939 I.R.C. (Op. pp. 4-5.) Nor do we recall that any one of the Judges of this Court, as constituted in the original hearing on March 14th, directed any inquiry to either counsel on this major point upon which your existing decision is partially predicated.

It is understandable and natural that this question or issue was not in focus or considered at the March 14th hearing, since the Tax Court made no reference to, nor finding of fact upon, nor decision upon it. Nor does the record before this Court indicate, in any statement of points to be relied upon by counsel for either party, that the "* * * interests taken by said children were 'future interests' within the meaning of the statute * * *" (Op. p. 4) which results in your decision of June 7th denying the $3,000 annual exclusion to each donor for each of the eleven children. It is true, that the respondent utilized in a catchall argument of a little over a page of his brief, at page 22, his generalized postulate that the "* * * gifts to the non-contributing stockholders (children), * * * would have been gifts of future interests, * * *". (If gifts to the children and not to the corporation had in fact been made.) But it is equally true that, throughout the record and oral arguments before this Court on March 14th, there was no responsive attention given to this

then apparently abandoned and, as here applicable, factually remote point. We believe that to permit your decision to stand on the present state of the record will effect an unnecessary injustice upon these petitions. Moreover, although your present opinion indicates (Op. at p. 4, and again at p. 5), that the children are the real beneficiaries or donees of these gifts, the absence of a square decision upon that crucial point will undoubtedly provoke further controversy with the government, not only by these petitioners but other taxpayers, who are awaiting your decision, as well. Your failure to decide who are the real donees point will create other problems, such as: What will be the *basis of these donors* stock; and what will be the *basis of the noncontributing shareholders* stock on a sale or other income tax realization by any of them?

So, in all humility, both as counsel for petitioners and as an officer of this honorable Court, we respectfully ask for a hearing or rehearing to brief the major point of: Whether an unfettered owner of a share or shares of common capital stock of a California corporation (the children here) is the beneficial owner of a "future interest" *under any provision of the federal gift tax statute,* any proper treasury regulation issued in pursuance thereof, or any appropriate court decision?

Realistically viewed, the petitioners' cases are clearly distinguishable, on their facts, from all of the court decisions relating to the so-called trust conditions or limitations which inveigh against certain donees having the "* * * present power of possession and en-

joyment of the gift." Petitioners counsel has carefully reexamined all of the cited cases in these proceedings, as well as carried on further extensive legal research in this matter, with the sincere conviction that on this point they are not applicable to the Heringers' cases. All of those other cases show the donee has a future interest because of the required "joint action" of either another donee as well as himself, or the trustee as well as himself, or there is a clear postponement of his right to either or both the income and principal of the subject matter of the gift. In short, in all of the cited cases the donee may never come into possession and enjoyment let alone have a "present power" to bring about such possession and enjoyment, as here. Those cases are therefore very wide of the mark in these Heringer matters.

Basically, the "* * * present power of possession and enjoyment of the gift, * * *" (Op. p. 4) in the hands of the Heringers' children is best and most forcefully seen in their individual and unconditional power to individually and presently realize upon their individual aliquot capital interest in the assets of Vorden Farms corporation (the real measure and real subject matter of the gifts here) *by sale of their individual stock—right now!* In these circumstances it is difficult to see how one could reasonably substantiate the proposition that an outright gift of common capital stock, without any strings attached or "joint action" of anyone, is the gift of a "future interest" under section 1003 (b) or under any other applicable provision of the Internal Revenue Code relating to the

taxation gifts, *qua gifts.* Yet, is not that essentially what the respondent is asking the courts to rule in these cases at bar?

Each of the several children of the Heringers have just as much of a "present power of possession and enjoyment" of the principal and income of 60% of the stock of Vorden Farms, Inc. which they each individually own outright as do their parents who similarly own the other 40%! There are here no trust limitations or strings attached as clearly appear on the facts and as lucidly shown in the opinion of Mr. Justice Stone, who wrote all three, in the Hutchings, Ryerson and Pelzer decisions of the Supreme Court. (Your, Op. 4.) A careful reexamination of those opinions leave little doubt as to how Mr. Justice Stone would have distinguished them from the cases at bar. Cf., *A. Gregory v. The State of California,* 77 Cal. App. (2d) 26, 174 Pac. (2d) 863. Neither does the *Wells case* (Op. 4), which provided that the amount of *income and principal* to be distributed to the beneficiaries *should rest entirely in the discretion of the trustees,* come even close on the facts here. Nor does the opinion in the *Skouras* case (Op 5.) apply for there the "joint action" of the *other joint assignee* was necessary to the destruction of the joint interest in the assigned policy. Compare, *S. R. Baer,* 2 TCM 285, where, as here pertinent, the Tax Court held that the irrevocable assignments of life insurance directly to a single beneficiary are gifts of present interests. Thus, in these Heringers cases, each child stockholder individually owns his or her stock outright. There are no

trust conditions or joint action restrictions on any of these stockholders *present power* or right to principal (by sale of their stock) or income (dividends, like any other shareholder.) Stockholders so situated clearly have *present interests under the gift tax law.* To hold otherwise would distort and be disruptive of the plain understanding of every American owning a share of stock. On the nature of a stockholders interest under California law, see, *MacDermot v. Hayes,* 175 Cal. 95, at 114, 170 Pac. 616; *W. F. Boardman Co. v. Petch,* 186 Cal. 476, 199 Pac. 1047.

Certainly, no one could rationally suggest that the donor-parents have only a "future interest" in the 40% of the stock of Vorden Farms, Inc. which they each individually and severally own. *How then can each of the eleven individuals and adult children, who are in precisely the same position of severalty of ownership, be treated differently?*

Indeed, the Record discloses that the whole generic idea of these petitioners, their factual intentions, and their executed transactions, as recognized by a partial holding of this Court, point to what we believe is the inexorable conclusion that the non-contributing shareholders or children (as Congress intended) are the real donees of present and not future interests. The record also shows that, because of these circumstances, the *basis* for the children's stock is the same value per share as is the basis of the stock in the hands of the parents. To hold otherwise would be an inequitable distortion of the facts in the record.

We shall be happy, without further belaboring this Court here or at this time to submit orally or in written memorandum form what we believe are additionally helpful, pertinent, and convincing authorities to support the foregoing views.

Dated, San Francisco, California,
June 29, 1956.

Respectfully submitted,
R. E. H. JULIEN,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the within petition for rehearing is well founded and is not interposed for delay.

R. E. H. JULIEN,
Attorney for Petitioners.